nonetheless, remains a ground for divorce. The court pointed to legislative restriction of civil liability for certain acts of selling alcoholic beverages to minors, while criminal liability remains. Finally, the court noted that the legislature has adopted SDCL 41-9-9, which retains civil liability for any person who is engaged in hunting and injures a person or property:

> Any person who is engaged, legally or illegally, in hunting is liable for any injury or death to any person or damages to property caused by the hunter's negligent actions. The injured person or the owner of the property that has been damaged may recover civil damages. Nothing herein shall abrogate any other provision of law.

SDCL 41-9-9.

The South Dakota Supreme Court also highlighted the fact that the legislature has retained criminal hunting trespass liability for some of the conduct relevant to this case. Pet. App. 44-45. For example, there is a 660-foot safety zone surrounding each occupied dwelling, church, school house, or any livestock, and Section 41-9-1.1(2) does not allow hunting within this 660-foot safety zone, nor does it allow any projectile to travel into this safety zone. Much of the conduct of which Petitioners complain below (shot hitting their home and a nearby shed; shooting around a home, buildings, or cattle) is still a crime under South Dakota law, Section 41-9-1.

Petitioners present an alternative interpretation to the interpretation of this statute by the South Dakota Supreme Court. This interpretation is based here, as it was below, on certain statements from state officials and individual legislators of what each of these persons believed the

statute means. The South Dakota Supreme Court rejected this interpretation. Pet. App. 41-42. The court held that these statements by state officials or legislators are not a part of the sovereign power of the State of South Dakota. The court also held that the hunting handbook excerpt Petitioners quoted does not deal with the subject of hunting on public road rights-of-way, but rather, deals with the subject of "unarmed retrieval," a concept that Petitioners have not challenged. Pet. App. 42 n.13, final paragraph.

In the South Dakota Supreme Court there was a majority for the opinion with this interpretation. A fourth justice agreed that there was not a Fifth Amendment taking, but based his view on his belief that the encroachment was limited, the legislature was entitled to balance the benefits and burdens, and the statute did not amount to either an actual physical invasion under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), nor was it a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). A fifth justice believed that there was a taking because the legislature specifically allowed hunting, and did so in such a way as to physically occupy the land. Petitioners have adopted this justice's dissent on the meaning of this South Dakota statute.

Respondents do not contest the history of the course of the proceedings contained at pages 3-5 of the Petition. Respondents would point out that they asserted the decriminalization rationale in their answer, which was the first opportunity to assert it.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' ARGUMENT REQUIRES THIS COURT TO SUBSTITUTE ITS JUDGMENT FOR THAT OF THE SOUTH DAKOTA SUPREME COURT ON THE MEANING OF A STATE STATUTE.

This case concerns the constitutional implications of decriminalization of certain acts of hunting trespass. Prior to 2003, South Dakota statute criminally prohibited shooting over another's land. The challenged enactment decriminalized that action to a limited degree, but, in the judgment of the South Dakota Supreme Court, left all civil remedies intact. Pet. App. 42-43 n.14. This statutory interpretation is the definitive interpretation by the South Dakota Supreme Court, which is the highest state court and the court of last resort for interpretation of South Dakota statutes. S.D. Const. art. V, §§ 1, 2. This Court is bound by that court's interpretation of state statutes. As stated in *Chicago v. Morales*, 527 U.S. 41, 61 (1999), federal courts "have no authority to construe the language of a state statute more narrowly than the construction given by that state's highest court." This Court has repeatedly held that "state courts are the ultimate expositors of state law . . . and . . . we are bound by their constructions except in extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 75-80 (1997) (encouraging federal courts, when there is a difficult and undetermined issue of state law, to seek an answer through the certification process; the state court interpretation of state law is definitive).

Petitioners' primary argument is that the South Dakota Supreme Court erred in its interpretation of state

law. But Petitioners may not seek to have this Court reinterpret a state statute that is clear on its face and that has been finally construed by the highest state court. Reference to statements of state officials or individual legislators who were considering the statute do not overcome the state court's holding. Under South Dakota law, "When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Benson v. State of South Dakota*, 2006 S.D. 8, ¶ 71, 710 N.W.2d 131 (Pet. App. 45-46) (citing *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611). The South Dakota Supreme Court not only has authority to make a final interpretation of this statute, but it did so according to the statute's plain words. This interpretation may not be impeached by declarations of others, which are not even expressions of the State's sovereign power. Pet. App. 41-42 n.13. Therefore, to the extent that the Petition depends on a reinterpretation of South Dakota law, it does not raise an issue for this Court's determination. The federal issues in this matter must be viewed through the lens of the South Dakota Supreme Court's interpretation of the statute. When viewed in that fashion, the South Dakota Supreme Court interpreted federal law correctly, and Petitioners have established no basis for a federal constitutional violation.

II. THE SOUTH DAKOTA SUPREME COURT UNDERSTOOD AND CORRECTLY APPLIED THIS COURT'S TAKINGS PRECEDENT.

While Petitioners argue that the South Dakota Supreme Court improperly applied this Court's cases, their

argument clearly lacks substance when one views the South Dakota Supreme Court decision. The South Dakota Supreme Court understood this Court's takings jurisprudence. It understood and correctly determined and applied those cases to the facts before it. Once the South Dakota Supreme Court determined the meaning of the statute, it examined this Court's precedent and applied it. Its decision is correct, and Petitioners have cited no authority in any court that conflicts with its decision. There further is no important question of federal law that has not been settled by this Court that ought to be so settled. Petitioners propose no new rule that would cause the result below to change. If anything, they allege only misinterpretation or misapplication of a state statute. *See* Rules of the Supreme Court, Rule 10.

Even though none of the considerations governing this Court's review on certiorari are applicable, it is plain that the South Dakota Supreme Court decision was correct. In interpreting the South Dakota statute, the South Dakota Supreme Court did nothing but track the words of the statute and give them their plain, ordinary meaning. Pet. App. 45-46. The court stated: "Again, we are reminded that legislative intent is determined from what the Legislature said, not what we think it said or others think it said." (Citing *Martinmaas*, 2000 S.D. 85, ¶ 49, 612 N.W.2d at 611.) Reading the words of the statute, the court came to the conclusion that its only effect is to remove certain defined conduct from the crime of hunting trespass. This conclusion is neither remarkable, unusual, nor incorrect.

Under this Court's precedent, there is no causal connection between SDCL 41-9-1.1(2) and the harm that Petitioners have undergone in this case, even if that harm took place. The South Dakota Supreme Court understood

this well, and cited *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (*Portsmouth II*) for the proposition that governmental action must be the cause in fact of specific harm for there to be a Fifth Amendment taking. Under this standard, which applies where a regulatory taking is alleged, *see Griggs v. County of Allegheny*, 369 U.S. 84, 87 (1962), the harm Petitioners allege arises not from the state statute, which merely decriminalizes certain hunting conduct, but from the conduct of hunters who are not agents of the State, nor can their actions be attributed to the State. Petitioners' injuries are caused by the hunters, not by the State. Moreover, as the court recognized (Pet. App. 41 n.13), the statute does not purport to take away the right to exclude, and thus the right to prevent such damage. Rather, it takes certain conduct out of a criminal statute while still allowing all "classical common law and statutory remedies for assertion of rights in private property." *Id.* at 43 n.13.

The South Dakota Supreme Court found that the statute undertaking this limited repeal of a crime is not the cause of Petitioners' harm.

Insofar as Petitioners attempt to assert a permanent physical invasion of their land, the South Dakota Supreme Court's interpretation of the statute and of the facts of the case led it to a conclusion that there was no permanent physical occupation under *Loretto*, 458 U.S. at 435. Unlike *Loretto*, there is no factual allegation of any "fixed structure on land or real property." Unlike *Portsmouth II*, 260 U.S. at 329, there has been no showing of diminution in value, and there has been no showing that the governmental entity itself has "the intention of firing [cannons] over claimants' land, and without the intent or ability to fire them except over that land." The South Dakota Supreme

Court's language as it analyzed this claim of actual physical invasion or occupation closely followed this Court's language in all of the applicable cases. Pet. App. 28-33. The South Dakota Supreme Court carefully considered all the facts alleged, carefully compared them to this Court's governing precedent, and, in light of its interpretation of the state statute, found that the conduct rendered non-criminal was limited to small game bird hunting seasons, applied only to licensed hunters, was limited to certain hours of shooting, applied only to a limited number of birds, and applied only where the bird had taken flight from the right-of-way or flew over the road right-of-way, where the hunter is located within that road right-of-way. The court also found that the conduct decriminalized is temporary in nature, takes place only during the hunting season, and, to the extent there is more harmful conduct (such as shooting around homes or livestock), it continues to be criminally prohibited.

In considering whether there was a *Loretto* per se taking, the Court also recognized that hunters who engage in conduct described in SDCL 41-9-1.1(2) "may do so without risking prosecution for a criminal offense." Pet. App. 32. Petitioners retain, however, their right to exclude hunters from their land, unlike Ms. Loretto, who was required to allow cable television equipment in her building. To the extent that Petitioners take issue with this application, they do so only on the basis of their varying interpretation of the statute. This Court may not overrule the South Dakota Supreme Court on that point.

Likewise, the court was correct in determining that there was no regulatory taking under the rationale of *Penn Central*. The court carefully noted and analyzed each of the *Penn Central* factors, including that the decriminalization it

found did not directly appropriate Petitioners' property, and that Petitioners did, by the traditional civil remedies, retain the right to exclude others from their property. The court also considered the economic impact of the regulation on Petitioners and interference with distinct investment-backed expectations. The court found that any economic injury resulted from the possible decrease in the number of game birds. The court found, however, that these game birds are now, and have always been, public property. Pet. App. 50-51. Petitioners may not, therefore, claim economic injury because some portion of a public resource will not be available to them. The statute, further, does not stop the landowners from granting servitudes and easements for hunting to others for a price. The landowners still may devote as much of their land as they wish to pheasant habitat, or to some other income-producing venture. But the State is not a guarantor of the game bird population, and that population is a publicly owned resource. Pet. App. 52.

The court noted, finally, that its rationale elsewhere applied fully to these factors as well: That is, the actions of the State in adopting the statute, decriminalizing certain activity but not prohibiting landowners' enforcement of their rights, does not cause damage to the landowners. Rather, the cause is action by hunters, which still constitutes a civil wrong against the landowners. The fact that their actions no longer constitute a crime is not the cause of any injury Petitioners claimed. The court correctly summed up its holding as follows:

> Reduced to its core, Landowners' argument is that the State faces two options: it must for the first time in its history be compelled by the Constitution to declare an act to be in violation of a

> criminal law or in the alternative pay Landowners for its refusal to do so. Landowners cite no case law to support this argument and we have been unable to find any court which has so held. This argument improperly attempts to shift the resolution of the issue from the legislative arena to that of this Court. While the Legislature certainly enjoys the legal authority to once again make this type of activity criminal in nature, there is nothing in our Constitution to compel it. To hold otherwise would be to rule that compensable takings have been ongoing since 1889, except for that short period of time when the Legislature chose to criminalize the conduct described in SDCL 41-9-1.1(2) . . . .
>
> Furthermore, any civil remedies that existed prior to the passage of SDCL 41-9-1.1(2) remain intact. In fact, Landowners cite no legislative roll-back of any civil causes of action that have existed for the protection of their property rights. At all times immediately prior to, and after this Court's holding in *Rumpca*, 2002 S.D. 124, 652 N.W.2d 795, and the legislative reaction to it by the amendment of SDCL 41-9-1.1(2), landowners' civil remedies against hunters remained the same.

Pet. App. 53-54.

III. THERE WAS NO TAKING AT ANY TIME AFTER THE PASSAGE OF THE STATUTE.

Petitioners argue that they suffered a taking between the time of the passage of the statute and either the supreme court's decision or the time that the State first asserted this defense on November 18, 2003. This contention relies on the proposition that a plainly worded statute

meant something else when it was passed than it meant when it was interpreted by the South Dakota Supreme Court.

No case law supports this novel argument. The temporary takings cases cited assume that the State used these landowners' land between the time the statute was passed and the time it was interpreted. The South Dakota Supreme Court decision precludes any such interpretation. That decision does not indicate that it is changing the meaning of the statute. Rather, it states clearly that it is taking the legislature at its word "from what the legislature said, not what we think it said or others think it said." Pet. App. 46. The court stated explicitly that "at all times immediately prior to, and after this court's holding in *Rumpca*, 2002 S.D. 124, 652 N.W.2d 795, and the legislative reaction to it by the amendment of SDCL 41-9-1.1(2), landowners' civil remedies against hunters remained the same." Pet. App. 54.

This holding by the South Dakota Supreme Court on an issue of state law precludes any argument that civil remedies differed at any point between the decision in *State v. Rumpca*, 2002 S.D. 124, 652 N.W.2d 795, the enactment of the statute, and the court's decision on the statute. As a matter of state law, those remedies have not changed. Since the remedies are present under state law, there can be no violation of federal law for failure to have them in place. Argument II of the Petition is without substance, as there has been no change in the meaning of the applicable statute since it was passed. Pet. App. 54.

IV. PETITIONERS' COMPLAINTS ABOUT THE INADEQUACY OF AN "AFTER THE FACT CIVIL REMEDY" ARE WITHOUT SUBSTANCE.

The State does not dispute the proposition that an owner of real property has the right to use it to the exclusion of all others. Petitioners argue, however, that a civil remedy is inadequate and the State must provide criminal liability against those shooting over Petitioners' property. One answer to this distinction between "before the fact" and "after the fact" remedies is that criminal liability is equally "after the fact" to civil liability. There is no more ability, with the crime in place, to exclude the armed hunter from shooting over Petitioners' property than there would be without. It is obvious that the existence of criminal prohibition in the statute does not prevent crimes "before the fact" from occurring. While the power of the State may be directed toward solving and punishing the crime, that punishment no more occurs "before the fact" of the crime than would a civil remedy.

Moreover, as the South Dakota Supreme Court pointed out (Pet. App. 22-24), the State of South Dakota did not originally provide for criminal prosecution of those who trespassed by hunting. Rather, regulation of hunting has varied over the years, and has never provided a vested right in criminal prosecution of those who committed a hunting trespass. Petitioners' apparent argument that all trespass by hunting must be criminal flies in the face of history. Unless the original South Dakota Legislature committed a taking of Petitioners' land merely by failing to criminalize all trespasses against it, Petitioners' argument must fail.

Further, Petitioners either fail to grasp, or intentionally play down, the inevitable conclusion of their third argument. It simply cannot be the case that Petitioner property owners have a right to demand criminal prohibition and prosecution of all forms of trespass to land. This Court has held, to the contrary, that those who are not challenging their own prosecution "lack[] a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

As Justice Zinter in concurrence recognized below (Pet. App. 17-18), the landowners lack an interest in the prosecution or nonprosecution of individual hunters, and they thus are unable to establish a causal connection between their injury and the conduct complained of. Pet. App. 18.

Under this Court's precedent, Petitioners who are not threatened with prosecution under this criminal statute have no right to demand that it be enacted, repealed, or otherwise changed. As the South Dakota Supreme Court recognized (Pet. App. 54), determining whether a particular act ought to be criminal is a legislative question, not a matter for the judiciary, and it may not support a taking. This Court has also held that defining state crimes is a function of state law, not of federal law. *Jackson v. Virginia*, 443 U.S. 307, 324 n.16 (1979). Petitioners may not demand that the criminal law be rearranged or that it be changed so that it is more to their liking, and it does not constitute a taking for the legislature to refuse to make all civil trespasses criminal.

CONCLUSION

Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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